ARTICLE

FUNDAMENTAL PROPERTY RIGHTS

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I. INTRODUCTION

It is ultimately, if not immediately, mysterious that American jurisprudence generally recognizes no constitutionally fundamental property rights, good as against the government. Generally, there is no distinctively property-based right or interest of which the holder may be deprived only upon a showing of a compelling state interest, coupled with a showing that the measure or action depriving the owner of her property is narrowly tailored to effectuate the measure's purpose.[1] This Article refers to several reasons why this may be so, but its central purpose is to specify at least a narrow but potentially significant class of property rights, indentifiable at reasonable cost in the judicial setting, that clearly merits the special protection accorded fundamental rights.[2] To throw this narrow class into sharp relief, we will consider the legitimacy of their compensated but nonconsensual taking under the government's eminent domain power based on the current permissive case law, and from a perspective that draws upon the substance and methodology of less accomodating, and ultimately convincing, contemporary and classical legal philosophy.

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1. For a broad overview of the case law developing and imposing this "strict scrutiny" test in the context of fundamental rights, *see generally* 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW (1986). *See also* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

2. The notion of fundamental property rights is used here for its obvious linkages to certain constitutionally recognized fundamental liberty rights and to certain strands of legal and moral philosophy, but other terminology is possible. Given, for example, the Calabresi and Melamed framework of property rules, liability rules, and inalienability, our thesis is simply that there are at least some property rights that should be protected by property rules. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). On their schema, property rules require transfer by means of a voluntary transaction. *Id.* at 1092. Calabresi and Melamed correctly cite a typical eminent domain situation as invoking the protection of a liability rule, under which fair or objectively determined compensation must be offered, but the owner's consent need not be obtained, as opposed to a property rule. *Id.* at 1092-93. *See also* Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 932 (1985).

The argument herein is intended to avoid dependence on any particularly controversial understanding of the term "property." Some have despaired, understandably, of a fully satisfactory definition of property in related contexts.[3] For our purposes, though, there is no obvious harm in assuming, unless otherwise indicated, even the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . ."[4]

No one would doubt, for example, the presence of a property right issue of some sort if a putative condemnee objected to a state's plan to take his treasured, heavily annotated high school yearbook for shredding and use in repairing an expanding leak in a publicly-owned dam, despite an admittedly legitimate public use or purpose in repairing the dam and an admittedly generous, well above fair market value, offer of compensation to the putative condemnee.

On the merits of this thankfully rather contrived example, of course, the courts generally would certainly hold for the condemning authority, all else equal, and all procedural requirements complied with, as against the owner's protestations as to the obvious availability of equally serviceable dam-fill material, in the market or by condemnation, with no distressing psychological consequences for any condemnee.

Even if we sense no injustice or property rights violation in the yearbook condemnation, it should be borne in mind that this example falls only in the midrange of potentially disturbing cases. Least disturbing, for our purposes, are mere uncompensated pecuniary expenses incurred by the condemnee.[5] Into a middle range category would fall a variety of generally uncompensated psychic losses associated with broadly "personal," sentimental, emotional or related injuries, including the loss or disruption of merely

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3. *See, e.g.*, Humbach, *A Unifying Theory For the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 245 (1982). For one analysis, see Dowling, *General Propositions and Concrete Cases: The Search For a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353 (1985).

4. United States v. General Motors Corp., 323 U.S. 373, 377 (1945). Further, the examples discussed will almost invariably fall within what Bruce Ackerman has called "social," or generally obvious, property, as opposed to "legal" property, recognizable only by the legal specialist. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116-23 (1977); Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's* Private Property and the Constitution, 79 COLUM. L. REV. 44, 57 (1979).

5. *See, e.g.*, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 432 & 432 n.111 (1983) (citing 4A P. NICHOLS, EMINENT DOMAIN § 14.2471, at 14-284.1 to -335 (rev. 3d ed. 1976)).

settled or familiar patterns, routines, objects, or social relationships.[6]

Potentially most disturbing, though, are instances in which a proposed condemnation would jeopardize or undermine the condemnee's very identity or self-image, the material basis of her self-respect, core personality, or long-term life plans or their meaning. Not all grievous, emotionally wrenching losses or dislocations necessarily fall into this category; a sentimental loss can be psychically devestating without calling one's basic self-conception or identity into question. The latter sort of loss may occur as a result of non-consensual takings, however generously compensated, that take insufficient account of our practice of infusing our personality into tangible or intangible objects in such a way that our creative transformation of the object becomes itself a process of self-construction, of the creation and transformation of our own identity, of the development of our own basic personality.

There is of course no clear and sharp division between losses of the second type, of "merely personal" losses, and of the third type, of "identity losses." There is perhaps a difference between the two categories generally in the degree of conscious creative transformation of object or of self intended. One may develop mere "attachments" to persons, objects, and places through a largely random or inadvertent process, but one may also seek to transform both self and object through certain property relationships. At least some minimal percentage of hobbies, avocations, small (or large) businesses, or obsessions, along with their material requisites, must fall into this third category.

The third category, of identity-constitutive property rights, will be elaborated throughout this Article. It will be argued that at least some such rights should be recognized as constitutionally fundamental. Immediately, though, we recognize one reason why they are typically not so recognized: the potential profundity of certain property relationships is hardly hinted at by the most widely circulated analyses of the concept, which focus rather bloodlessly on such incidents as "possession" and "use."[7]

At least some third category property right situations may also create actual conceptual anomalies. It might be supposed, for example, that there is a moral or legal principle of the additivity or conservation of rights or entitlements to a piece of property; that the rights, say, of four subsequent

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6. *See, e.g.*, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 432 (1983).

7. *See, e.g.*, Waldron, *What is Private Property*, 5 OXFORD J. LEGAL STUD. 313, 336 (1985) (citing Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest ed. 1961)); Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972) (property as involving rights of use, exclusion, and transfer as well as rules relating to punishment, damages, and liability).

owners of the property must in a sense be neither more nor less than those of its sole prior owner. But this view may lead to disturbing results, once the possibility of property inseparable from identity is admitted.

Consider a case in which each of a huge number of us has taken off a bit of time to make a vanishingly small contribution to, and thereby acquired a vanishingly small, but protectable, legal interest in, an Easter Island-type sculpture under construction. It seems doubtful that for all purposes, our property rights in the sculpture should, additively, equal those of a solitary individual sculptor who has utterly invested, transformed, and created his basic personality and self-definition through his life's work devotion to a physically identical sculpture.[8] The devoted solitary sculptor may have a qualitatively different relationship with his property than those of a plethora of dilettante sculptors. As we shall see below, the law should respect this difference in at least some cases.

In the meantime, it must be recognized that identity destruction is in an important sense simply non-compensable in pecuniary terms; an utterly different self, an unchosen person is the recipient of any financial compensation for this kind of loss. Scrupulously compensating such a condemnee for lost fair market value, inconvenience, costs of relocation or litigation, and so forth cannot begin to make the condemnee whole, or indifferent as to her pre-condemnation and post-compensation states, as she is, by hypothesis, not the same subject, against her will. Still less can it credibly, or even meaningfully, be said to such a condemnee that over the long term, perhaps through legislative logrolling, the benefits and burdens of the institution of eminent domain will tend to balance out.[9]

Ordinarily, when we recognize an impending grievous loss and the inadequacy of money damages to compensate the injured party, we at least consider the possibility of injunctive relief.[10] This is of course not ordinarily done in condemnation cases once the legitimacy of the public use or purpose of the taking is conceded, despite the apparent recognition of the law that homeowners, for example, may not be indifferent as between retention of their homes and monetary compensation for losses incurred through condemnation.[11]

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8. *Cf.* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57-58 (1985).

9. *See* Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 583-85 (1984) (citing Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 156-57 (1977-78)).

10. *See. e.g.*, Scott v. Jordan, 99 N.M. 567, 573, 661 P.2d 59, 65 (App. 1983) (citing New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 392 A.2d 1383 (1978); Gregory v. Sanders, 635 P.2d 795 (Wyo. 1981)).

11. Consider the policy logic of "substitute condemnation" as discussed in Berger, *The*

Of course, it must be admitted that not all takings of vital, identity-constructive property will utterly destroy the property's identity-value for its owner. There may clearly be a difference for, say, a Frank Lloyd Wright as to whether his own home is condemned as a sort of living museum, or condemned in order to be razed for a highway. Similarly, it is possible, if less likely, for a mere police power regulation to substantially impair, if not utterly destroy, an object's identity-value, if a single vital use of that property is prohibited, even if the property continues to exist in form. As a general rule, though, regulation will normally be preferred to condemnation by our third category owners, and it is perverse from their standpoint to encourage takings over regulation by holding the former less enjoinable, on the theory that the fifth amendment's just compensation clause,[12] or a comparable state constitutional provision,[13] affords the sole remedy.

Finally, it is entirely possible that any fundamental property rights we detect may, at least in rare circumstances, be trumped in practice by a condemnor's showing of a compelling governmental net interest in the condemnation and the absence of any feasible alternative less burdensome courses of state action. While it is difficult to tell from the opinion and even from the commentary, it is possible that the well-known case of *Poletown Neighborhood Council v. City of Detroit*[14] may qualify as a rare instance of the conjunction of a compelling state interest in at least the prospect of substantial urban employment effects with the absence of available alternatives less burdensome to any identity-constructive rights that might be detected in the massive community dislocation required to prepare the tract for General Motors.[15]

Public Use Requirement in Eminent Domain, 57 OR. L. REV. 203, 219-20 (1978) (citing Pitznogle v. Western Md. Ry., 119 Md. 673, 87 A. 917 (1913)).

12. *See* U.S. CONST. amend. V.

13. *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 4.1 (J. Sackman rev. 3d ed. 1976).

14. 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam).

15. *See id. But see* the opinion of Ryan, J., dissenting in *id.*, and the uneasy, if not skeptical, commentary such as Note,

Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. REV. 409 (1983). The difference in result between cases such as *Poletown* on the one hand and *In re* Petition of City of Seattle, 96 Wash. 2d 616, 638 P.2d 549 (1981) (en banc), in which a municipal improvement project was held not to constitute a public use, may lie not so much in the difference in formal constitutional standards applied to the taking, but in the relatively greater employment-conscious panic evinced in *Poletown*. For a strong expression of the importance of community-based values in this context, *see* Bender, *The Takings Clause: Principles or Politics*, 34 BUFFALO L. REV. 735, 826 (1985).

II. PROPERTY RIGHTS AND LIBERTY RIGHTS

It is important both to recognize the relevant similarities between, as well as to differentiate, constitutional rights to property and to liberty, whether deemed fundamental or not. Neither sort of right need be characterized or defended as natural or non-contractual.[16] Similarly, just as it would be absurd to ask, in a constitutional context, whether there is a broad, general, fundamental right to liberty, *simpliciter*, so it would be unreasonable to imagine a correspondingly broad fundamental right to property. There are instead certain narrow, specifiable fundamental liberty rights recognized in particular contexts;[17] similar recognition may be accorded similarly limited fundamental property rights.

Importantly, it should not be simply assumed that whatever claim any property right may have to constitutionally fundamental status utterly depends for its cogency on whatever contribution the property right in question may make to the preservation of liberty.[18] The constitutionally cognizable value of property rights is not simply derivative of the value of liberty rights.

Liberty and property, and their corresponding rights, clearly cannot be defined in terms of each other. Even avoiding strict and precise, and therefore suspect, definitions of either, it seems uncontroversial that liberty, at least in its constitutionally more familiar "negative" sense,[19] is essentially a matter of the range or number of available alternative choices or actions and their value, whether such options are ever determinately exercised or not.[20] Property, on the other hand, at least in our central cases, involves a determinate, if changeable relation between the owning subject and the owned tangible or intangible object, with the focus of analysis on the actual, as opposed to merely available option of, use, enjoyment, or contemplation of the object, along with the actual greater or lesser creation or transformation of both the object and the owning subject.

To put the point in a somewhat different way, it is clear that even if the use or transformation of a given item of property in a specified, particu-

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16. *Cf.* Christman, Can Ownership be Justified by Natural Rights, 15 PHIL. & PUB. AFF. 156, 156, 160 (1986). *See also* Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 230 (1985).

17. Consider the scope of the fundamental liberty right of interstate travel apparently recognized in Shapiro v. Thompson, 394 U.S. 618 (1969) as apparently narrowed in the context of divorce, as opposed to welfare eligibility, residency requirements in Sosna v. Iowa, 419 U.S. 393 (1975).

18. This claim is made most recently in Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem for the Public Use Limitation on Eminent Domain*, 60 NOTRE DAME L. REV. 388, 396 (1985).

19. *See I. Berlin, Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY (1969).

20. *See* MacCallum, *Negative and Positive Freedom*, 76 PHIL. REV. 321 (1976).

lar way were compulsory—either physically compelled, or required with the threat of punitive sanctions for disobedience—and hence plainly not a matter of liberty or freedom of choice, the property or property relationship could still be intact and of substantial value to the owning subject. The "meaningfulness" of the property, or the property relationship, to the owner is therefore not a function of the owner's liberty.[21]

The inconsistency, or mutual supportiveness, between private property and various basic liberties has been mooted by writers as diverse as Herbert Spencer and Karl Marx. It may suffice for our purposes to note that while there are doubtless certain tensions between private property rights generally and certain basic political freedoms,[22] at a general level, the constitutional framers more broadly assumed a more sanguine view.[23] The narrow fundamental property rights argued for in this Article seem, on balance, inseparable from and supportive of any plausible, valued set of basic liberties. They are not generally inconsistent with some elements of social or collective property ownership, with the recognition of welfare rights enforceable at law, or with broad-based, principled programs of redistribution of income or wealth. Nor do they mandate such institutions, at least without further argument not attempted here.[24]

The distinguishability and separate functioning of property and liberty rights does not mean that notable takings will not potentially impinge on both sorts of rights. The *Poletown*[25] circumstances, involving the severance of neighborhood friendships and long associations, may have involved elements of both. This suggests, rightly, that while there is a certain conceptual logic and economy to fixing whatever is wrong with takings doctrine through a property rights approach, liberty-based partial solutions may also

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21. Professor Humbach attempts to draw a consistent distinction between two sorts of property interests, the right to the forebearance of others, and the freedom to use and enjoy. Humbach, *A Unifying Theory For the Just Compensation Clause: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 253 (1982). Even if such a distinction is tenable, it is clear that the sorts of property interests of central concern to us cut across this dimension.

22. *See, e.g.*, R. FLATHMAN, THE PRACTICE OF RIGHTS 199-230 (1976).

23. *See, e.g.*, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710 (1985) (discussing the Madisonian conception).

24. It is sometimes argued that the institution of eminent domain is in practice biased against the poor and the powerless. *See, e.g.*, Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 48 (1980). This, despite the plausible assumption that the economic costs of organization and collective action would normally be low. It may then be of particular moment to note that the fundamental property rights view argued for herein cannot usefully be characterized as narrowly biased or of value only to the middle class. The most impecunious of peasants may utterly invest himself in, and conceive of his productive life largely in terms of, his modest plot of land, the taking of which, even with compensation, would be identity-threatening.

25. 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam).

be possible.[26]

III. Preliminary Objections to a Fundamental Property Rights Analysis

It is readily maintainable that a fundamental property right analysis is dependent for its coherence and force on some sort of notion of personality, and that "the notion of personality is too vague to enable us to deduce definite legal consequences by means of it."[27] While it might be replied that the indicia of a fundamental liberty, as opposed to property, right are not themselves luminously clear, and that even once identified, fundamental liberty rights do not by themselves permit definite legal inferences, there is certainly some appeal in this objection.

A full response must await the remainder of the argument below. In the meantime, it can simply be observed that in a practical or literal sense of the term "fundamental," our personality is ordinarily susceptible to hierarchical analysis. Our liking the color blue is a part of our personality that is ordinarily not as profoundly important or self-definitive as our relationship with our spouse or home, which may, or may not, also constitute aspects of our personality. Some aspects of personality are, upon reflection, recognizably closer to the core than others, in part because of the depth and richness of their implications. If forced to choose, we would not consider all aspects of our personality equally central and equally worth retaining. We would be "lost" without certain aspects of our personality,[28] and quite unmoved by the loss of others.

It is also possible to argue that any fundamental property rights detected will either be too narrow to be of general interest, or too broad to be credible as trumps to most ordinary putative takings. One suspects that to a properly placed holder, even a remarkably narrow fundamental right is of substantial interest. How broadly a fundamental right should be extended, or how narrowly constricted, can be generally guided by the theory developed below, but is perhaps ultimately best resolved incrementally, through case law development.[29]

It may also be argued that the more plainly central to personal identity

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26. *See* Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem for the Public Use Limitation on Eminent Domain*?, 60 Notre Dame L. Rev. 388, 399 (1985) (citing, most notably, the very judicious article by Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982)).

27. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 18 (1927).

28. *See, e.g.*, Rawls, *Justice as Fairness: Political not Metaphysical*, 14 Phil. & Pub. Aff. 223, 241-42 (1985).

29. Compare the comparable elaboration and narrowing process of the fundamental right of interstate travel noted *supra* note 17.

a particular property relation becomes, the greater the risk that the property relation becomes a destructive attachment, obsession, fetish, monomania, or addiction of some sort.[30] Presumably, one is reluctant to characterize such relationships as healthy, let alone as deserving of strict scrutiny protection. While the risk is perhaps real, it is undeniable that most typical obsessions, e.g., with drugs, say, or with making money for its own sake, do not involve a single object subject to taking. The drugs to be prized and consumed, or the money to be made, today is physically distinct from that to be prized, consumed, or made tomorrow. A taking of today's money or drugs is not destructive of the owner's identity, as in our central cases. It is also clear that not all instances of identity-constitutive property relationships are plausibly characterized as pathological, or as indicative of misplaced priorities, or of indifference to other people. Persons may be devoted, as well as obsessed. Hearing that Louis Pasteur's laboratory had burned to the ground would have inspired sympathy, not relief at the perhaps unavoidably abrupt lifting of Pasteur's "obsession."

Retreating a bit, the practical argument may be made that even if a narrow fundamental property right were detectable in the abstract, judicial recognition of such a right is simply not worth the administrative costs of sorting and filtering the claims that would inevitably arise. For practical reasons, therefore, it would be prudent to deny judicially what we know philosophically.

One obvious accomodation of this objection is to assume that narrowly defined rights will tend to draw appropriately limited numbers of serious, not merely pro forma, claimants. The costs and delays and other evidentiary problems associated with vindicating any claim of fundamental right can presumably be reduced by relying mainly on obvious, cheaply accessible, objective proxies of the underlying, admittedly ineffable subjective states of mind. Reasonably objective, if not documentary, evidence should be normally available of such matters as length of residence, time normally spent doing a particular thing, and so forth. While such matters as the availability of alternative, less fundamental right-burdening courses of government action may require the use of the discovery process, such standard practical problems do not seem unduly burdensome when balanced against the value of preserving rights that, by hypothesis, are deemed of crucial practical importance, quite apart from the explicit, indisputable recognition of property rights in the text of the Constitution itself.

One might also be wary of recognizing any fundamental property rights in the eminent domain context, for fear of creating incentives to so-

30. One is reminded of the Marxist tradition of "commodity fetishism". *See also* J. ELSTER, SOUR GRAPES (1983); Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 762 (1986).

cially wasteful strategic behavior. Hold-out or other strategic behavior is of course endemic in the eminent domain context generally.[31]

However, it would seem precisely the area of central concern to us, in which a person has infused her personality into property and defined and created that personality through that property, that is least subject to strategic manipulation. Our central case, at least on its own terms, could not be further removed from strategic behavior.[32] As well, one does not apparently or actually devote oneself to an object in the hope or more or less soundly based expectation that the government will, after a long passage of time, normally, condemn the object, merely so that the owner can block the taking, on the assumption that a court would give him the extra negotiating leverage of a fundamental right. There are simply easier, quicker, surer ways to make as much money.

Finally, it may be argued that to accord to a right status as constitutionally fundamental is to assert its universal value and appeal, and that a system of enforceable private property rights lacks this quality. It has been noted, for example, that "from the perspective of a hunting people . . . definite property in land may seem undesirable and indeed may cause *in*security."[33] It is less clear whether such hunters are equally put off by the notion of private property in hunting knives or other tools of the trade. In any event, there is an obvious breadth of appeal in contemporary American jurisprudence for at least some minimal recognition of some set of private property rights, and if it is true that no system of even narrowly circumscribed fundamental property rights will lack for detractors, this is at least equally true of, say, our fundamental right to choose which, if any, religious tenents to believe, in the general absence of state inducements.

IV. RAWLS AND THE FUNDAMENTAL RIGHT TO PROPERTY

At some risk of condemnation for engaging in a painstaking, conscientious Lochnerization[34] of the matter, this section makes one of a variety of possible affirmative philosophical cases for a constitutionally fundamental property right.

While John Rawls of course does not purport to be doing contitutional

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31. *See, e.g.*, Meidinger, *The "Public Uses" of Eminent Domain*, 11 ENVTL. L. 1, 52 (1980); Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974).

32. *Cf.* T. SCHELLING, THE STRATEGY OF DECISION (1960).

33. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 86 n.55 (1985) (emphasis in the original).

34. *See* Lochner v. New York, 198 U.S. 45 (1905). *See also* Kelso, *Substantive Due Process As a Limit On Police Power Regulatory Takings*, 20 WILLAMETTE L.J. 1, 18 (1984).

theory directly,[35] and while on Rawls' theory such matters as "the question of private property in the means of production . . . are not settled at the level of the first principles of justice . . . ,"[36] Rawls is quite explicit that constitutional law must apply and accord with the principles of justice selected in his Rawlsian original position.[37]

Certainly, there are substantial information constraints on the rational contractors behind Rawls' veil of ignorance.[38] What they do know, however, is sufficient to allow them to choose principles, or further refinements or specific interpretations of those principles, that bind constitutional drafters to recognize what amounts, in essence, to at least some narrow fundamental property right.[39]

Even at the stage of the very notion of veil bargaining or discussion, the foundations for a fundamental property right begin to emerge. The notion of actual or hypothetical bargaining, based on rational individual interest, itself logically presumes a reasonably strong continuity of identity or basic personality over extended periods of time in society, otherwise the point or advantage in choosing one particular package of rights and rights limitations over another fades dramatically. If the self that one is choosing moral principles for is too ephemeral, plastic, or oceanic in identity, the point and possibility of rationally preferring one set of moral arrangements dissipates. At least some sort of set of enforceable property rights is necessary if the self is to be guaranteed an anchoring in society.

The general features of the principles of justice that emerge from behind the veil are well-known and will not be rehearsed here.[40] It must suffice to say that the "equal basic liberties" that Rawls views as absolute, secure, and inviolable[41] under ordinary circumstances include, among others, "the freedoms specified by the liberty and integrity of the person . . . and . . . the rights and liberties covered by the rule of law."[42] Of

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35. *See* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1017 (1973).

36. Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 53 (S. McMurrin ed. 1982) (hereinafter cited as *Basic Liberties*).

37. *Id.* at 55.

38. *See J. Rawls, A Theory of Justice* 136-37 (1971).

39. The veil parties are disabled from knowing social facts that illicitly bias their choice of principles, but they are presumed to know "the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology." *Id.* at 137.

40. For a recent authoritative restatement, see *Basic Liberties*, *supra* note 36, at 5. A statement of Rawls' earlier formulation is also contained in Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 970 n.23 (1973).

41. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 160-61 (1971).

42. *Basic Liberties*, *supra* note 36, at 5.

course, these sets of rights will tend to overlap substantially, generally and in our context in particular.

Rawls explicitly notes that his formulation does not recognize or attribute weight to any general right to liberty.[43] The concept of a liberty right must be differentiated and subdivided. Similarly, it is important in our context to focus not on some global right to property generally, which must be easily overrideable if it exists at all, but on the logical role and value of more specifically formulated property rights.

Rawls then specifies that "among the basic liberties of the person is the right to hold and to have the exclusive use of personal property."[44] He explains that "the role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers."[45] Self-respect is important further in that "it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out. Without self-respect nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them."[46]

It is an essential feature of Rawls' basic liberties in general, whatever their implications for property rights, and of the basic liberty, in Rawls' terminology, to hold and exclusively use personal property in particular, that they receive what Rawls terms "lexical" priority, or that they "have an absolute weight with respect to reasons of public good and of perfectionist values."[47] This means simply that whatever the possible conflicts among the basic liberties—and it seems reasonable to assume that genuine conflicts between identity-constitutive property relations and the exercise of other basic liberties will be rare—the Rawlsian right to personal property cannot be subject to overruling or involuntary tradeoff for the sake of mere public purposes, values, or goods, as on some sort of utilitarian calculus.

Even pre-analytically, then, it is clear that Rawls' theory of justice is incompatible with familiar eminent domain principles under which a taking of private property, vital or not, need be justified only by reference to some reason of state or collective good.[48]

Equally important, the Rawlsian basic liberties apart from property

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43. *Id.*

44. *Id.* at 12.

45. *Id.* Rawls refers in *id.* at 16 to the two moral powers of a capacity for a sense of right and justice, and the capacity for a conception of the good.

46. *Id.* at 33.

47. *Id.* at 8.

48. *See*, most prominently, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) and Berman v. Parker, 348 U.S. 26 (1954), but more restrictive formulations of the public use requirement also tend to fall afoul of Rawlsian principles.

rights also implicate and necessitate the similarly absolute protection of at least a narrow class of basic property rights. For example, on Rawls' analysis, the function of freedom of conscience and association is to permit the individual's "forming, revising, and rationally pursuing a conception of the good over a complete life."[49] A person behind Rawls' veil of ignorance would recognize that if at least some profound property relationships are not appropriately protected from violation, with or without monetary compensation, her ability to form and pursue a variety of eligible life plans would be jeopardized and set at needless, unacceptable risk.

More generally, to the extent that persons cannot engage in personality construction and development through the creation and transformation of property and use of such property itself over time, there is correspondingly little point to most other political liberties, arrangements, or guarantees that persons could arrange via any sort of social contract.

The essential value of at least a narrow fundamental right to property also emerges through Rawls' discussion of the so-called primary goods. Rawls argues that "a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan."[50] Persons behind the veil of ignorance must recognize that weakening the legal protections accorded what we have referred to as identity-constitutive property relations is far more likely to risk and jeopardize whatever long-term plans they may develop, risking and jeopardizing thereby their own happiness, than it is to contribute to their fulfillment.

Rawls refers more specifically to the social bases of self-respect as a kind of primary good.[51] The social bases of self-respect include "those aspects of basic institutions normally essential if citizens are to have a lively sense of their own worth as persons and to be able to develop and exercise their moral powers and to advance their aims and ends with confidence."[52]

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49. *Basic Liberties*, *supra* note 36, at 50. Rawls' theory at this point could be used to give coherence not only to textually based fundamental constitutional rights to property, but to non-textual fundamental rights to personal privacy. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). There is at least some sort of relationship between privacy and property at its deepest level. Even such illiberal horrors as a compulsory government arranged, random-pairing marriage loses much of its power to appall if the parties to such a union have not had much opportunity to engage in self-definition, or whose identities are in permanent flux. Property is probably essential to the process of self-definition, at least for most of us. *See, e.g.*, G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 51 (T. Knox ed. 1965).

50. J. RAWLS, A THEORY OF JUSTICE 92-93 (1971). *See also Basic Liberties*, *supra* note 36, at 21-23.

51. *See, e.g.*, *Basic Liberties*, *supra* note 36, at 23.

52. *Id.* It may be noted parenthetically that while Rawls often couches his argument in terms of groups, classes, or "representative persons," his argument in this context applies with

Again, the persons behind the veil, not knowing whether they will be ascetic saints or not during their lives, cannot gamble that they can somehow attain self-respect in the absence of as strong a protection of vital property rights as is compatible with other fundamental concerns. There are no obvious recurring conflicts among Rawlsian primary goods such as to suggest the desirability of leaving the protection of vital property interests to a merely utilitarian calculus, or some other modest standard.[53]

As Rawls points out, self-respect is ordinarily dependent upon the respect that other persons bear for us.[54] Further, conceptions of justice "should publicly express men's respect for one another."[55] Respect for others, or the course of treating them as autonomous ends in themselves, and not merely as means, requires more than even a conscientious utilitarian calculation of the loss of life-meaning that some condemnations may threaten.

In the central, identity-constitutive property cases, the crucial un-Kantianism,[56] or unfairness, or exploitation, which cannot be erased by showering the condemnee with compensation, inheres not so much in the disproportionality of the burden imposed upon one or a few condemnees, but in the implicit denial of the condemnee's basic identity, the contempt for her basic life-choices, and in the assumption of the essential meaninglessness of the condemnee's life, or the condemnee's lack of capacity to invest her life with the meaning derived from the property in question.[57]

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equal force to individual persons.

53. While it is quite possible that two persons could construct their identities through the same piece of property in ultimately incompatible ways, the exercise of eminent domain rarely pits crucial identity values on opposite sides of the condemnation. The point of condemnation is of course typically to demolish or radically transform the particular property. *Cf.* Baker, *Property and its Relation to Protected Liberty*, 134 U. PA. L. REV. 741, 762 (1986). Similarly, while identity-constitutive property may be of immense social value in some incompatible alternative use that does not rise to the level of a compelling state interest, the condemnor must still pay full market value of the property's highest and best use on any theory. *Cf. id.* For a condensed account of the Rawlsian primary goods and their functions, *see Basic Liberties supra* note 36, at 22-23. For the crucial character of self-respect, *see* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 977 (1973).

54. J. RAWLS, A THEORY OF JUSTICE 178 (1971).

55. *Id.* at 179.

56. The possible bearing of Kantian ethical principles on certain aspects of broader takings problems is discussed in B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution*, 79 COLUM. L. REV. 44 (1979).

57. This is not to suggest that rational actors would never trade off any self-definitive property, e.g., one's extensive, self-acquired butterfly collection, for other primary goods, such as income and wealth, at any rate. Of course, immense amounts of merely fungible money may allow one to begin the renovation of one's identity with alacrity. There are no fundamental rights, including the right to address political issues, that rational persons would never

Rawls also emphasizes the importance, in choosing among possible moral principles, of the stability of the conception of justice involved, as opposed, for example, to the probable strains of compliance or adherence that commitment to the principle would involve.[58] One important factor contributing to stability is that the principles selected be "rooted not in abnegation but in affirmation of our person."[59] It is precisely in our identity-constitutive property cases that rational contractors would most want to "insure themselves against the worst eventualities,"[60] and under moral principles recognizing or requiring a fundamental property right, "they run no chance of having to acquiesce"[61] in the disruption of their identity, with or without compensation, "for the sake of a greater good enjoyed by others. . . ."[62] A fundamental property right rule, suitably drawn, with recognition of the possibility of a genuinely compelling state interest, imposes less commitment strain than our current, almost unconstrained takings rules.

Our excursion through Rawlsian moral philosophy is not dependent for its value on a theory that it is generally appropriate to inject widely respected moral and legal philosophy into the Constitution.[63] That the framers of the Constitution placed great importance on the protection of property rights is textual and undeniable. A literal reading of the Fifth Amendment establishes only that the drafters contemplated some kinds of takings.[64] The proposition that property can be taken for public use only if compensation is paid is not logically equivalent to a permissive view that all kinds of property, regardless of the nature of the relation between owner and object, can be taken for any public use. The Fifth Amendment, by itself, does not answer questions of the fundamental right status of at least some property relationships. Moral philosophy may help answer questions such as whether the framers could reasonably have concluded that in cer-

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voluntarily exchange, in some measure, for the sake of a fortune. There are limits, though, and much tighter limits on such exchanges when involuntary.

58. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 176-77 (1971); *Basic Liberties*, *supra* note 36, at 31-32.

59. *Basic Liberties*, *supra* note 36, at 31.

60. J. RAWLS, A THEORY OF JUSTICE 176 (1971).

61. *Id.*

62. *Id.*

63. For a sampling of some of the most interesting work in the past decade on modes of constitutional interpretation, see J.H. ELY, DEMOCRACY AND DISTRUST (1980); Brest, *The Misconceived Quest For the Original Understanding*, 60 B.U.L. REV. 204 (1980); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551 (1985); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

64. *See, e.g.*, G.R.G. MURE, THE PHILOSOPHY OF HEGEL 165 (1965).

tain specifiable takings situations, no compensation could be "just" or appropriate.

The support for a fundamental right to property that can be drawn from Rawls' theory does not depend, further, on some idiosyncratic Rawlsian value preferences. We might, as a potentially illuminating, if somewhat daunting, thought experiment, try to imagine someone with Hegel's understanding of the general facts of society behind Rawls' veil of ignorance.

Hegel understood property as the right to acquire and own, possess and use, by putting one's socially respected will into, external objects such as mere things and animals without rational wills of their own. On Hegel's view, "property is the *embodiment* of personality. . . ."[65] At least in cases where such embodiment is unusually profound, sacrifice of personality approaches sacrifice of the person, and there is no obvious reason to countenance this except upon a compelling state interest.

On the relationship between property and the "social bases of self-respect," it is apparent that Hegel's thought parallels the lines ascribed above to Rawls. "Through property man's existence is recognized by others, since the respect others show to his property by not trespassing on it reflects their acceptance of him as a person."[66]

For Hegel, property has not only an instrumental function, which might be served by mere money or just compensation; as well "it is a basic requisite for man in his struggle for recognition and realization in the objective world. . . ."[67] For Hegel, for Rawls, and for this Article, the crucial moral dimension of property is not the act of laboring itself, or marking off the object as one's own, or deserving the object, but the nature and functions of the relation between owner and object.[68] On Rawls' theory, and for someone with a Hegelian understanding of society behind Rawls' veil of

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65. G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 51 (T. Knox ed. 1965) (emphasis in the original). *See also* S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE 136 (1972); Stillman, *Property, Freedom and Individuality in Political Thought*, in XXII NOMOS: PROPERTY 132 (J. Pennock & J. Chapman eds. 1980).

66. S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE 136 (1972).

67. *Id.* at 135. Of course, for Hegel, individual private property rights belong to the sphere of what Hegel calls Abstract Right, which is transformed and incorporated into the higher stages of morality and ethical life. *See, e.g.*, G.W.F. HEGEL, PHILOSOPHY OF RIGHT addition to § 46 (T. Knox ed. 1965); *id.* at X (translator's forword). This does not mean that private property rights wither before reasons of state, however. One commentator has observed that "the absolute right of the state, which may call on its citizens to die for it, can in ordinary circumstances no more abrogate private property than any other individual liberty." G.R.G. MURE, THE PHILOSOPHY OF HEGEL 165 n.2 (1965).

68. It has been said that "the attractions of Hegel's development of the concept of property depend on our everyday feelings about our need to identify with and express ourselves in things we make, control and use." A. RYAN, PROPERTY AND POLITICAL THEORY 131 (1984).

ignorance, it is incumbent that at least the most vital, identity-constitutive sorts of property relations receive moral and constitutional protection equivalent to that normally accorded fundamental rights on a strict scrutiny analysis.

V. A FUNDAMENTAL RIGHT TO PROPERTY AND CURRENT THINKING ON PROPERTY RIGHTS

The historic American tendency has been to regard the right to property, generally, as at least in some sense fundamental,[69] but to generally permit incursions or limitations imposed by any positive law.[70] This amounts more to an antinomy than to a consensus.[71]

It is clear on the one hand, again, as a general rule, that

> Despite the inclusion of the takings clause in the Bill of Rights, the Court, as part of its reaction to Lochnerism, has relegated property rights to second-class status by classifying measures affecting them as economic legislation entitled to a close to insuperable presumption of constitutional validity.[72]

This view tends to rely not only on a distinction between personal and property rights, but on the assumption "that all property rights may be treated alike."[73]

On the other hand, it has been suggested that "we are entering a . . . phase . . . in which substantive constitutional content will once again be given to property rights. . . ."[74] Proponents of this approach have plausibly suggested that property rights are not simply a reflection of class-based ideology and that the dichotomy between personal and property rights is false.[75] They have not, however, provided a satisfactory explanation of why

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69. *See, e.g.*, Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976). *See also* THE FEDERALIST No. 54 (J. Madison)(J. Cooke ed. 1961).

70. Both sides of this antinomy are represented in Blackstone. *See* Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 77 (1985).

71. Professor John Costonis has observed that "while the conception of property rights nurtured by William Blackstone, Adam Smith and John Locke is now suspect, no firm consensus has yet crystallized to take its place." Costonis, *"Fair" Compensation and the Accomodation Power: Antidotes For the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1025 (1975).

72. Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465, 476 (1983).

73. Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 428 (1983).

74. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 597 (1981).

75. *See, e.g.*, Justice Stewart's opinion in Lynch v. Household Finance Corp., 405 U.S.

not all property rights should be treated as of a piece constitutionally.

One reason given for the apparent trend toward increasing respect for property rights, at least in some contexts, is, logically enough, the allegedly decreasing utility derived from the industrial or other development in virtue of which individual or neighborhood-based property rights are overriden.[76] It may be disputable that there is some fixed stock of environmental or scenic amenities that is unequivocally reduced by development, or that the economic value of a new shopping center is less than in former times, but this is irrelevant if cultural values are in fact changing in the way indicated.

Professor Sax has speculated along these lines that "it may be that as growth and development seem to become less valuable guides for future well-being, those things that speak to sustenance, continuity, adaptation and evolutionary change rise sharply in value."[77] Certainly, the exercise of eminent domain is most usually the enemy of continuity; it is when eminent domain impinges on the most vital sorts of continuity, as of identity or core personality, as in some takings of multi-generationally held family business premises, that eminent domain requires the most vigorous restriction.

Ultimately, the most illuminating question may be not whether property is rising in importance relative to collective developmental interests, but whether, among the multiple justifications for property rights, those that suggest a fundamental right status for some property rights are rising in importance relative to those that do not.

Among the latter are the familiar utilitarian incentive arguments. On the assumption that "no man will sow where another will reap . . . ,"[78] it has been observed that "[t]he theory that stable property expectations are necessary for productivity pervades legal doctrine."[79]

On the incentive-based arguments, there is no need for any sort of fundamental right status; people may well still be inclined to behave productively if they believe that they have merely a high probability of enjoying the fruits of their labors. Equally importantly, the incentive-based arguments for property rights seem adequately accomodated by even a liberal takings regime, as long as there is something like a just compensation clause requiring payment to the condemnee. At the level of a broad and

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538, 552 (1972).

76. *See* Sax, *Some Thoughts On the Decline of Private Property*, 58 WASH. L. REV. 481, 489 (1983).

77. *Id.* at 490.

78. Ryan, *Utility and Ownership*, in UTILITY AND RIGHTS 175, 181 (R. Frey ed. 1984).

79. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561, 587 (1984). *See also* Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1976) ("[a] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities").

free use of one's property, particularly for economic profit, there is little obvious point or justification to invoking a fundamental right.[80]

Property, however, is also justifiable on grounds independent of incentives. Charles Reich has classically noted that "property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner."[81] The mere assertion of eminent domain rises no higher than the assertion of a mere legislative majority. Reich goes on to insist, with implications for our identity-constitutive property rights, that "there must be a zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control."[82]

It has similarly been argued that private property rights must reflect each individual's "capacity to shape and pursue his or her own conception of a meaningful life."[83] More concretely, "[t]he properties a person owns are his way of controlling and shaping nature in order to develop, affect, and express his own character and his ways of living and working."[84] Of course, taken broadly and literally, these principles would prove too much in establishing a fundamental right to property; the choice of brick over wood in selecting a residence may ordinarily reflect one's tastes and personality,[85] but at a level too superficial to constitute a choice embodying the exercise of a fundamental property right.

This is not to suggest that courts must rely solely on a general theory and their own intuitions in determining the scope of fundamental property rights, although the examples cited throughout this Article seem obvious

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80. *See* Kelso, *Substantive Due Process As a Limit On Police Power Regulatory Takings*, 20 WILLAMETTE L. REV. 1, 33 & 33 n.140 (1984) (criticizing Morgan & Shonkwiler, *Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Process*, 16 WILLAMETTE L. REV. 591, 632 (1980)).

81. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964). *See also* Pennock, *Thoughts on the Right to Private Property*, in XXII NOMOS: PROPERTY 177 (J. Pennock & J. Chapman eds. 1980) (identity and dignity).

82. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

83. Sartorius, *Persons and Property*, in UTILITY AND RIGHTS 196, 196 (R. Frey ed. 1984).

84. Stillman, *Property, Freedom and Individuality in Political Thought*, in XXII NOMOS: PROPERTY 138 (J. Pennock & J. Chapman eds. 1980). *See also* Perry, The Importance *of Being Identical*, in THE IDENTITIES OF PERSONS 89 (A. Rorty ed. 1976) ("long-range commitments and projects" as "the source of the continuity of character and personality and values that constitute integration"); Williams, *Persons, Character, and Morality*, in *id.* at 209 ("ground" project or projects as significantly giving meaning to one's life). Of course, even one's "ground" projects are subject to (voluntary) reassessment. *See* Taylor, *Responsibility For Self*, in *id.* at 296.

85. *See* Grey, *The Disintegration of Property*, in XXII NOMOS: PROPERTY 77 (J. Pennock & J. Chapman eds. 1980).

enough. Beyond subjective testimony, and such proxies as length of family or individual ownership, courts would normally agree that multiple ownership—diffusely held corporate stock, as opposed to a closely-held corporation or sole proprietorship—would be among the relevant factors. As Charles Reich has pointed out, "[m]ultiple ownership of corporations helped to separate personality from property. . . ."[86]

Similarly, while mere residence property without more does not qualify for fundamental right status, it is clear that in the "loose hierarchy" of property interests, undeveloped land held for speculative investment tends to be less central to individual identity and life-meaning than actively used residential property.[87]

Having directly worked on something oneself is obviously also important, though this should not be thought to cut generally in favor of a preferred status for tangible property. "[I]ntangible property, if it is in the form of, say, shares of stock, may possibly be psychologically less close than one's car, while the same might not be true of an original idea[88] or an artistic creation."[89] The nature and quality of the relationship between property and owner is obviously only dimly reflected at best by the tangible versus intangible property dimension.

VI. A FUNDAMENTAL RIGHT TO PROPERTY AND CURRENT THINKING ON EMINENT DOMAIN

In an era of greater intellectual discretion, Morris R. Cohen once observed that no one had lapsed into so great a confusion as "to argue that the state has no right to deprive an individual of property to which he is so attached that he refuses any money for it."[90] While this Article has perhaps taken some issue with Cohen's view, it is clear that in recent times, the Supreme Court has endorsed the strongest possible version of the Cohen view.

As of 1954, the Court could be said to have erased the otherwise cru-

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86. Reich, *The New Property*, 73 YALE L.J. 733, 772 (1964).

87. *See* Sager, *Property Rights and the Constitution*, in XXII NOMOS: PROPERTY 378 (J. Pennock & J. Chapman eds. 1980).

88. While it is fair to suggest that raw ideas are not typically condemned, they may be and are condemned when in the form of, for example, trade secrets. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011-14 (1984). A perhaps even better known case of the condemnation of intangible property would be City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (en banc).

89. Pennock, *Thoughts on the Right to Private Property*, in XXII NOMOS: PRIVATE PROPERTY 180 (J. Pennock & J. Chapman eds. 1980). *But cf.* Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465, 514 (1983) (emphasizing particularly the psychological attraction of tangible property).

90. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 24 (1927).

cial requirement of a showing of a legitimate public use for the taking.[91] What was left remaining of a public use requirement is said to have been abolished as of 1984.[92] The result is said to "threaten to lay private property open to wholesale public acquisition limited, if at all, only by the availability of public funds to pay compensation for the taking."[93]

Yet the scholarly focus, both historically[94] and currently[95] has been not on preventing unjust condemnations, or even the tightening of the public use requirement, but on issues of compensation vel non or fair levels of compensation. The focus has been on compensation and compensation issues despite the obvious national concern for the "preservation" of property rights.[96] One does not preserve a right by setting a price on its destruction.

This tendency is partially explainable by the sheer practical salience of cases of total or partial economic loss because of regulation or condemnation.[97] Even the largest merely pecuniary losses are amenable in principle to compensation. More deeply, though, there is the modern utilitarian or wealth maximizing tendency to see only a mere quantitative or degree-of-intensity-of-preference difference between mere pecuniary loss or the bur-

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91. *See* Berman v. Parker, 348 U.S. 26 (1954); Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 423 (1983). *See also* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 560-61 (1972).

92. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Callies, *A Requiem for Public Purpose*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 8.02 (J. Moss ed. 1985). Ellen Frankel Paul has qualified as a moderate on the issue by referring to the public use requirement after *Midkiff* as "all but buried." Paul, *Public Use: A Vanishing Limitation On Governmental Takings*, 4 CATO J. 835, 835 (1985).

93. Callies, *A Requiem for Public Purpose*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 8.02[4], at 8-15 (J. Moss ed. 1985).

At the state level, condemnation is restricted not only by state constitutional provisions, but by the fourteenth amendment due process clause, even though the latter of course contains no literal takings or just compensation clause. *See* Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 235-41 (1897). The Supreme Court has apparently never reversed a state court finding that a particular use was public. *See* Sackman, *Public Use—Updated* (City of Oakland v. Oakland Raiders), in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 203, 207 (M. Landwehr ed. 1983). At least some state courts have preserved some of the substance of a public use requirement. *See, e.g.*, Merrill v. City of Manchester, 499 A.2d 216 (N.H. 1985); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); Karesh v. City Council, 271 S.C. 339, 247 S.E.2d 342 (1978). *See also* Note, *Containing the Effect of* Hawaii Housing Authority v. Midkiff *On Takings For Private Industry*, 71 CORNELL L. REV. 428, 444 (1986).

94. *See, e.g.*, Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

95. *See, e.g.*, Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 621 (1981).

96. *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985).

97. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

dens of unexpected inconvenience and what we have referred to as identity-disruptive takings, if the latter category is even imagined.

As a result, even when property rights are addressed in an eminent domain context, they are conceived of as rather colorless, fragile constructs:

> When there is such public need, "[t]he abstract right [of an individual] to make use of his own property in his own way is compelled to yield to the general comfort and protection of community, and to a proper regard to relative rights in others."[98]

Individual property rights on this analysis are pejoratively characterized as "abstract," balanced off against unspecified "rights" of others, and held to pale before some public good. Pitched in the extraordinarily general and sweeping terms of a broad asserted right to do precisely what one wishes with one's property, the right to property is without much force or substance.

An essentially economic or compensation-oriented approach, however, does not do justice to the historical concern in the eminent domain context for the control of arbitrary or tyrannical power.[99] Such an approach cannot explain why citizens, or hypothetical or actual contractors, would care about arbitrariness or tyranny only in the context of compensation, and not in the context of whether property should, in a given case, be taken at all for use that is admittedly public, or approved by a majority. Such an approach to the takings clause fails to recognize the clause adequately as "a bulwark against unfairness, rather than against mere value diminution."[100]

This is not to deny that there is some limited potential for compensation reform in our context. Requiring the condemnor to pay some premium above fair market value[101] obviously tends to marginally diminish the number of takings, and tends to capture some consumers' surplus for the property owner, but it has no obvious tendency to deter specially the most egregious takings.

Similarly, while it may be attractive to ask the condemnor to bear or account for certain "demoralization costs,"[102] or the social costs attributa-

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98. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 633-34, 304 N.W.2d 455, 459 (1981) (quoting nineteenth century Michigan authority) (brackets inserted in *Poletown* opinion).

99. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 57 (1964).

100. *Id.*

101. *See* Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 244-45 (1978).

102. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-16 (1967). Michelman discusses the possibility of a "personality"-based approach, but only in the context of compensation issues. *See id.* at 1205.

ble to public perceptions of a taking as unfair, threatening, or disruptive, even this limited measure is not unproblematic. Circularity threatens, clearly, if the court's own assessment of the fairness of the taking is indirectly or ultimately taken into account by the public in evaluating the fairness of the taking. Yet for the judge to know whether a particular taking is fair or not, she must know, among other things, the public's reaction.

If compensation-based approaches are largely unavailing in the context of identity-constitutive property, there is of course the obvious possibility of seeking to resuscitate the public use requirement. There is first the literalist approach of interpreting "public use" as "use by the public,"[103] even if facilities could be of great public benefit without being used by the public, and even if private facilities could be open to the public. The logic of this approach is that "if . . . private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislative?"[104]

One might as well opt for the restrictive view that the taking must be necessary in order to effectuate the public purpose sought to be effectuated.[105] On this view, the practical availability of other routes to the same end, perhaps including less burdensome condemnations, must be exhausted first.

From the standpoint of this Article, though, reinvigorated public use approaches, by themselves, are deficient in that they are insensitive to the possibility of identity-constitutive property being condemned, in the absence of or despite other alternatives, for public uses or purposes that may in fact be rather trivial, but that happen to fit within the narrowly-defined category of public uses. A lighthouse may be a classic "public good," and a legitimate public use on anyone's theory. There may be no other way to ensure the performance of the lighthouse's function than through a condemnation of identity-constitutive property. But what if the lighthouse will be of only modest actual public benefit?[106] It is therefore improper to imagine that "if

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103. *See, e.g.*, J. LEWIS, 1 A TREATISE ON THE LAW OF EMINENT DOMAIN § 165, at 417 (2d ed. 1900).

104. *Id.* at 418. Some sort of reinvigoration of the public use clause has been called for regularly, up through Comment, *Eminent Domain, The Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 514-15 (1986).

105. *See, e.g.*, Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 45 (1980); Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 763 (1986).

106. In his wide-ranging and intellectually provocative recent book, Professor Richard Epstein is more inclined to attempt to solve eminent domain problems through interpreting "public use" through the economic concept of public goods than to take note of the possibility of plainly vital property interests being sacrificed for inconsequential, but narrowly public, uses or goods. *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). *See also* Sax, *Takings*, 53 U. CHI. L. REV. 279, 286 n.30 (1986)

courts required that takings *actually* be for a public *use*, private property owners would realize adequate protection of their interests."[107]

Some courts and commentators have begun the process of approaching a recognition of a fundamental property right by engaging in some sort of balancing process. Thus one court has determined that "if the social costs exceed the probable benefits, then the project cannot be said to be built for a public use."[108] This view is of course a bit counter-intuitive in that no matter what counts as a cost or benefit, we do not know whether a lighthouse or a public highway connecting two cities is a public use until we know the social price to be paid.

If one wants to ask, however, whether "the condemnor's need for the taking outweigh[s] the harm to be visited upon the condemnee,"[109] the major practical decisions to be made are not just what kinds of things count as costs or harms, but whether any sorts of harms should qualify as harms of special importance, incomensurable with other sorts of (chiefly pecuniary) harms.[110] This Article has argued that the substantial impairment or disruption of identity in basic respects falls into this category.

There are at least occasional expressions of sympathy for an even more

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("none of [Epstein's] proposals would stymie industrial development, as contrasted with the absolute bars he imposes on welfare-type redistribution"); Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 HARV. L. REV. 791 (1986).

107. Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem For the Public Use Limitation on Eminent Domain*, 60 NOTRE DAME L. REV. 388, 399 n.100 (1985).

A final way of providing some substance to the public use requirement involves manipulation of the concepts of direct versus indirect benefit to the public, or primary versus incidental benefit, or the detection by the judiciary of legislative purposes in conflict with those asserted to justify the taking. The result can sometimes be a sort of rough justice of an intellectually unsatisfying sort. *See, e.g.*, Merrill v. City of Manchester, 499 A.2d 216 (N.H. 1985).

108. Merrill v. City of Manchester, 499 A.2d 216, 217 (N.H. 1985). *See also* Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 764 (1986).

109. Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 223-24 (1978).

110. Lawrence Berger, the author of the quoted balancing formula, ultimately concludes that "it would be only the more frivolous and arbitrary public takings that this rule would forbid." *Id.* at 243. An at least apparently more stringent test requires that the taking be the "most compatible with the greatest public good and the least private injury." Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 45 (1980) (quoting MONT. REV. CODES ANN. § 93-9906 (1964)). This test in itself gives no hint of how to proceed if greater public benefit can be purchased only at the cost of greater private injury, and does not develop the concept of private injury.

Some writers occasionally show interest in the values served by property rights in the eminent domain context. Frank Michelman, for example, has picked out the value of expressive and effective participation in the political order. *See* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1113 (1981). Michelman does not elevate any property interest to fundamental right status on this account.

restrictive approach to takings. One writer has argued, in part on the basis of the view that the right of the state can rise no higher than the additive sum of the individual rights that persons separately might bestow on the state, that the exercise of eminent domain can be justified "only in exceptional cases."[111] This rule would of course bar important condemnation projects on the basis of the merely arbitrary willfulness of the landowner.

It has similarly been argued that "any overriding of an existing property right must either be with the rightholder's consent or else be accompanied by just compensation. In consequence, where just compensation is impossible, and consent cannot be obtained, no overriding of the right is justifiable."[112]

In some cases, it may be that the level of just compensation is not ascertainable for technical reasons, even in the absence of significant values on the condemnee's side of the ledger. The appeal of this standard may depend upon whether it is felt to be impossible to justly compensate for a variety of significant and less significant, but real, psychological and emotional losses associated with many routine condemnations. The standard, as formulated, is of course also insensitive to the possibility of a genuinely compelling state interest susceptible of effectuation in no way other than through the particular condemnation.

VII. FINAL OBJECTIONS

Is it possible to reasonably contain the fundamental right to property, in a principled way, within the fields of eminent domain and the most extreme sorts of regulation? It might be thought that the view argued for here implicates even general, broad-based taxes.[113] Of course, while taxation promises no immediate, direct, personal compensation, it is crucial to remember that taxes can essentially be paid, generally, out of the property to which one is least attached. Merely writing a check, however painful, is not, in the typical taxation case, disruptive of identity.

It has been pointed out, however, that while we may be in some sense inseparable from some of our property, we clearly do not have such a profound relationship with all of our property. It will therefore be difficult for the government to predict in advance whether a particular taking will have an identity-disruptive effect. Therefore, eminent domain is an awk-

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111. Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J. L. & PUB. POL'Y. 165, 186 (1983). As against Pilon's rationale, it may be reasonable, for example, that a society, collectively, have a right that a given person be reasonably charitable, generally, even if no particular individual person has a right to be the recipient of that person's charity.

112. L. BECKER, PROPERTY RIGHTS 2 (1977).

113. *Cf.* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 596-97 (1972).

ward, almost useless tool for the tyranny of a malignant government. Therefore, it is said, our concern is at best overdrawn.[114]

One suspects that eminent domain need not be so blunt and ineffective an instrument, but that is hardly the main point. Briefly, government malice or tyranny is not the issue. If it were, most tyrannous takings could be blocked by the free speech, free press, and free exercise of religion clauses. What is to be feared in the main is ignorance, arbitrariness, insensitivity, or casual indifference on the part of a condemnor who is willing and able to pay. Wilful state oppression is obviously not the only possible cause of the severe deadweight losses of basic identity discussed throughout this Article.

Finally, it has been argued that there may be more subtle reasons why property is not protected, even in the most obvious instances, by rules along the lines suggested in this Article. Professor Radin has explicitly raised the possibility of deep protection for some property interests, without in the end endorsing or arguing for a fundamental right approach.[115] This may be partly because of the influence of her own terminology; the category of "personal," as opposed to "fungible," property seems too broadly encompassing to plausibly support a fundamental right.[116] Why construct a fundamental right to protect things like one's toothbrush?

In the course of her very useful analysis, Radin considers that our concerns may be outweighed by "the government's need to appear even-handed and the lower administrative costs associated with simpler rules."[117] This problem can be dealt with in part, as noted above,[118] through the use of objective, often document-based, proxies for the more ineffable qualities and relationships underlying our concern.

The more important response, though, is that even-handedness in this context means even-handedness, or equal governmental indifference, as between substantial disruption of condemnee identity and no such disruption at all. A consistently applied fundamental right rule is defensible as substantively even-handed, as opposed to being merely formally, even-handed.

Radin then suggests, however, that we simply tend to assume or expect that condemnors "will take fungible property where possible."[119] While it is sensible to suppose that malice is not the governmental norm, and while it is posible that there is some sort of correlation between fair market value of a property and the likelihood that it is of identity-constitutive character, Radin's perceived social assumption may be falsified by cases of govern-

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114. *Id.* at 597.
115. *See* Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014-15 (1982).
116. *Id.*
117. *Id.* at 1006.
118. *See supra* text accompanying notes 30 and 31.
119. Radin, *supra* note 115, at 1006.

mental casual indifference. Elected officials need not fear substantial losses of votes or contributions because of the condemnation of one or a few persons' property.

Ultimately, we may expect the government to take fungible property in about the same sense in which we expect government officials not to negligently inflict personal or property-damage injury on citizens. We expect government officials to exercise reasonable care, but we are not surprised, and we ordinarily provide appropriate legal redress, when they do not.

VIII. CONCLUSION

Definitively accounting for the absence of any fundamental right to property is of course impossible as long as the range of potential goals that a law to the contrary might be thought to serve is broad enough.[120] There is a sense, though, that at least some of the support for what often amounts to an apparently mysterious disregard of basic individual interests is merely inertial and historically residual. It is doubtless true that at a time when the very life of the community depended upon the most advantageous use of every resource that could be availed of, it was not to be expected that overrefined scruples with respect to the rights of private property would be allowed to stand in the way or that an individual who held his own title from a colonial grant would be allowed to use that self-same title to thwart the efforts of others to keep the colony alive.[121]Today, however, such social emergencies are both rare and easily recognized as compelling state interests, and we are less inclined to view all property ownership as a matter of collective largesse. The historical roots of a fundamental right to property are plain, and the contemporary justification clear and unambiguous.

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120. Hans Linde has noted

> identification of the goals of a law offers wide choice between the past assumptions of a policy and its present justifications, between actual and merely hypothetical goals, between immediate objectives and larger social aims, between a series of separate goals or a single accomodation of competing interests, and between the statements of legislators, executive officers, or state courts.

Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 215 (1976).

121. Sackman, *Public Use—Updated (City of Oakland v. Oakland Raiders)*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 203, 209 (M. Landwehr ed. 1983).